No. 90-456

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In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM K. REILLY, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

ROBERTA DELANEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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Respondents' brief in opposition does not provide a persuasive response to our petition for a writ of certiorari. Moreover, the significant changes in the law effected by the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, which the President signed on November 15, 1990, provide an additional ground for granting the petition, vacating the court of appeals' judgment, and remanding the case for further proceedings.

1. In opposing our petition for a writ of certiorari, respondents primarily contend that the government waived its right to challenge the court of appeals' action because "EPA did not object to respondents' request for

a federal plan promulgation order until after the decision below." Br. in Opp. 5. The government had previously argued, however, that respondents were not entitled to *any* relief because EPA's approval of Arizona's state implementation plans (SIPs) should be upheld. The government filed a timely petition for rehearing when the court of appeals not only reversed EPA's action but went on to impose the requirement that EPA promulgate federal implementation plans (FIPs) within a specified time period. The weakness of respondents' point is highlighted by the fact that neither the government nor respondents briefed the FIP promulgation issue prior to the court of appeals' decision. Respondents merely suggested that remedy in an isolated sentence of its 44-page brief, which described several alternative forms of relief. See Delaney C.A. Br. 43. There is no basis for concluding that the government waived its right to challenge the scope and nature of the remedy ordered by the court.

Respondents also contend that *General Motors Corp.* v. *United States*, 110 S. Ct. 2528 (1990), is "completely irrelevant to the correctness of the Ninth Circuit's remand order" because the judicial remedy in that case was an enforcement bar rather than an order requiring the agency to take certain actions. Br. in Opp. 6. *General Motors* indicates, however, that courts are to employ the Clean Air Act's statutory remedies, rather than create remedies of their own. See 110 S. Ct. at 2534. It is respondents' distinction between affirmative and prohibitive remedies that is beside the point. Similarly, respondents have no response to this Court's decisions, such as *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952), holding that a court of appeals may not dictate an agency's actions on remand.[1]

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[1] Respondents additionally maintain that the court of appeals' remedy "is precisely the one mandated under § 110(c) of the [Clean Air] Act." Br. in Opp. 7. That is incorrect. Section 110(c) of the Clean Air Act, as written prior to revision by the Clean Air Act Amendments of 1990, provided at least eight months for promulga-

2. On November 15, 1990, the President signed into law the Clean Air Act Amendments of 1990. Pub. L. No. 101-549. These Amendments extensively revise the Clean Air Act's requirements and impose significant new obligations on the States with respect to the control and abatement of air pollution within their borders. Respondents are incorrect in suggesting (Br. in Opp. 10) that the Amendments are not relevant to this dispute.[2]

a. Among the revisions, the 1990 Amendments rescind previous deadlines (including the Clean Air Act's 1982/1987 attainment dates (see § 172(a), 42 U.S.C. 7502(a)); establish new timetables, depending on the severity of the nonattainment problem in a particular area, for the attainment of the national ambient air quality

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tion of a FIP in situations, as here, involving transportation controls (see 42 U.S.C. 7410(c)), and that period was subject to further extension. Section 307(d)(10), 42 U.S.C. 7607(d)(10). In opposing our application for a stay of enforcement of the court of appeals' judgment, respondents argued that the eight-month period runs from the date on which Arizona was required, under the Clean Air Act Amendments of 1977, to submit a state implementation plan (SIP)—January 1, 1979. See Opp. to Stay 10 n.4. But that contention simply underscores *our* point—the court of appeals' remedy is *not* "precisely the one mandated under § 110(c) of the Act" (Br. in Opp. 7). Section 110(c), until recently amended (see pp. 5, 6-7 *infra*), dealt with promulgation of a FIP where a State's initial SIP submission was inadequate or non-existent; it did not provide a timetable for preparing a FIP where a court invalidated a SIP. Moreover, because the court's directive flatly required EPA to "promulgate" FIPs within six months, the court prohibited EPA from exercising its authority to approve newly revised SIPs submitted by the State of Arizona that would satisfy the Act's requirements. See § 110(c), 42 U.S.C. 7410(c). In sum, the court of appeals' decision ignored both the statutory timetables for promulgating a SIP and the role which States are to play in achieving attainment of air quality standards. As we explain *infra*, Congress has now modified the relevant provisions.

[2] We provided the Court and other counsel with a copy of Title I of the 1990 Amendments, as set forth in the House Conference Report, with our application for a stay. See H.R. Conf. Rep. No. 952, 101st Cong., 2d Sess. 1-181 (1990) (typescript version).

standard (NAAQS) for carbon monoxide (CO); direct the States to submit revised SIPs meeting new, more stringent requirements and demonstrating attainment of the NAAQS by the revised statutory dates; set new timetables for the submission of the SIPs; and direct EPA to promulgate FIPs only after a State has failed to meet those new requirements. The Amendments also provide that if the Administrator finds that a SIP is deficient, he has two years from the date of disapproval in which to promulgate a FIP.

With respect to CO nonattainment areas, Congress added new sections to Part D of the Act that set new and more stringent requirements for SIPs in such nonattainment areas.[3] Sections 186-187 (added by Section 104 of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 134-149). The Amendments establish two classifications of CO nonattainment areas—"moderate" and "serious"—and set new dates for the attainment of the primary NAAQS for each classification. Section 186 (added by Section 104 of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 134-138). For a "moderate" CO nonattainment area, the primary NAAQS must be attained as ex-

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[3] Subpart 1 of new Part D (§§ 171-179) sets forth general requirements for nonattainment areas. Under amended Section 172(b) (revised by Section 102 of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 33-60), the Administrator is to establish a schedule according to which States containing nonattainment areas shall submit a plan or plan revision. Each plan for a nonattainment area must meet certain general requirements. Revised Section 172(c), H.R. Conf. Rep. No. 952, *supra*, at 37-40. In addition, officials in each State containing a nonattainment area for any criteria pollutant are required to review jointly and update as necessary the planning procedures in effect before the Amendments or develop new planning procedures, as appropriate. Revised Section 174(a), H.R. Conf. Rep. No. 952, *supra*, at 47-48. In preparing such procedures, the State and elected officials are required, among other things, to determine which elements of a revised SIP will be developed, adopted, and implemented by the State and which by local governments or regional agencies or any combination of such entities. *Ibid.*

peditiously as practicable, but not later than December 31, 1995, a date that the Administrator may extend by up to two years if certain conditions are met. For a "serious" CO nonattainment area, the primary NAAQS must be attained as expeditiously as practicable, but not later than December 31, 2000. Section 186(a)(1), H.R. Conf. Rep. No. 952, *supra*, at 134-135.

Moreover, Congress imposed specific, and increasingly more stringent, requirements for Part D SIPs—depending on the area's nonattainment classification—with new deadlines for submitting the plans to EPA. Section 187 (added by Section 104 of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 138-149). In particular, a State must submit a CO SIP revision containing a demonstration of attainment for a "moderate" area within two years of enactment of the 1990 Amendments. Section 187(a)(7), H.R. Conf. Rep. No. 952, *supra*, at 141-142.

The 1990 Amendments also revise Section 110(c) of the Act, which addresses the Administrator's responsibility to promulgate FIPs. See Section 102(h) of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 60. Under the new law, the Administrator shall promulgate a FIP at any time within two years after: (a) the Administrator finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not meet the minimum requirements for plan submissions; or (b) he disapproves a SIP in whole or in part (unless the State corrects the deficiency and the Administrator approves the plan or plan revision before the Administrator promulgates such a federal plan). *Ibid.*

b. As the foregoing discussion shows, Congress has extensively revised the Clean Air Act to address the very problem presented in this case: the failure of numerous States to attain federal air quality standards for CO. EPA's obligation to prepare FIPs in this case should therefore be reconsidered in light of the 1990 Amendments. See *Bradley* v. *School Bd. of City of Richmond*,

416 U.S. 696, 711 (1974); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 282 (1969). Under the 1990 Amendments, EPA has no statutory obligation —indeed, it has no authority—to promulgate federal plans at this time.

The Clean Air Act is premised on congressional findings that "prevention and control of air pollution at its source is the primary responsibility of States." 42 U.S.C. 7401(a)(3).[4] And consistent with that understanding, the 1990 Amendments require the States to undertake a new round of planning, develop revised SIPs providing for the attainment and maintenance of the NAAQS by new dates, and meet revised criteria for such plans.

EPA's responsibility to promulgate a FIP under revised Section 110(c) exists only in relation to its statutory authority to review and disapprove state plans; it does not exist independent of the States' obligations to submit plans meeting the Act's criteria. EPA has authority under revised Section 110(c) to promulgate a FIP only where the Administrator, among other things, has disapproved a plan because it does not meet the revised criteria for state plans. See Section 102(h) of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 60. Even then, the Administrator is given *two years* to promulgate a federal plan upon disapproval of a deficient state plan.[5] The Administrator is relieved of the obligation

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[4] See also 42 U.S.C. 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State * * *."). The 1990 Amendments affirm this basic understanding. Congress amended Section 101(a)(3) of the Act to emphasize that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments * * *." Section 108(k) of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 174.

[5] Section 110(c)(1) formerly provided that the Administrator was to promulgate a FIP within either six or eight months after plan submittal. 42 U.S.C. 7410(c)(1). Thus, Section 110(c), as

entirely if the State corrects the deficiency and EPA approves the corrected plan within that time period. *Ibid.*

The State of Arizona is now under a new obligation to revise the CO SIPs for the Maricopa and Pima nonattainment areas and to submit these plans for EPA approval by revised dates.[6] EPA should not be required to forge ahead with promulgation of FIPs for these areas—FIPs intended to serve as substitutes for SIPs found deficient under an outdated statute—when Congress has specifically directed the State to revise its SIPs. The promulgation of FIPs pursuant to the court of appeals' mandate would undermine Congress's intent that the States develop new plans and would preempt what has historically been the State's primary role in pollution control and abatement.[7] Because the Amendments impose new obligations on the States and new timetables for meeting those obligations, the State of Arizona should be provided with the opportunity, granted by statute, to meet those obligations.

c. The Clean Air Act Amendments of 1990 include a general savings clause set forth in new Section 193 of the Act (added by Section 108(*l*) of the Amendments,

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amended, not only lengthens the period for preparation of a FIP, but it makes clear that where EPA disapproves a SIP, the time period commences from EPA's disapproval. See note 1, *supra*.

[6] The Maricopa area apparently will qualify as a "moderate" CO nonattainment area. Accordingly, the new attainment date is December 31, 1995, and the State has two years in which to submit a new CO SIP. Sections 186(a)(1) and 187(a)(7) of the Act (added by Section 104 of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 134, 141-142). See also H.R. Rep. No. 490, 101st Cong., 2d Sess. 258-259 (1990). Although the Pima area apparently qualifies as a nonattainment area by operation of law (*id.* at 134), it now appears to have attained the CO NAAQS.

[7] See, *e.g.*, *Union Electric Co.* v. *EPA*, 427 U.S. 246, 266-267 (1976); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975).

H.R. Conf. Rep. No. 952, *supra*, at 174-175).[8] Specifically, Section 193 provides that if a "control requirement" is required to be adopted by an order, settlement agreement, or plan in effect before the date of enactment of the 1990 Amendments, the "control requirement" may not be modified unless the modification insures equivalent or greater emission reductions of the relevant air pollutant. That savings clause, by its terms, does not preserve the court of appeals' requirement that EPA prepare FIPs for the State of Arizona.[9] Furthermore, the court of appeals' decision does not require the adoption of any specific "control requirements."[10] Thus, Section

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[8] Section 193 states in full (emphasis added):

> Each regulation, standard, rule, notice, order and guidance promulgated or issued by the Administrator under this Act, as in effect before the date of the enactment of the Clean Air Act Amendments of 1990[,] shall remain in effect according to its terms, except to the extent otherwise provided under this Act, inconsistent with any provision of this Act, or revised by the Administrator. No *control requirement* in effect, or *required to be adopted by an order, settlement agreement, or plan in effect* before the date of the enactment of the Clean Air Act Amendments of 1990 in any area which is a nonattainment area for any air pollutant may be modified after such enactment in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

[9] As defined in the 1990 Amendments, a FIP is:

> a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

Section 108(j), H.R. Conf. Rep. No. 952, *supra*, at 173 (amending Section 302 of the Act, 42 U.S.C. 7602). In other words, a FIP is a comprehensive scheme by which all the Act's requirements can be met and is not itself a "control requirement."

[10] The court of appeals' decision requires EPA to promulgate FIPs within six months that "utilize all available control measures

193 has no application in this case. See 136 Cong. Rec. S17,237 (daily ed. Oct. 26, 1990) (statements of Senators Wilson and Chafee).[11]

d. The implementation of the Clean Air Act is a matter of important national interest. As this Court has stated, "in great national concerns * * * the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). A requirement that EPA prepare FIPs for Arizona in accordance with the court of appeals' judgment would be inconsistent with the newly enacted Clean Air Act Amendments of 1990. Indeed, Senator Chafee, a principal architect of the 1990 Amendments, made exactly that point in explaining the limited scope of the savings provision:

> If EPA were to promulgate complete new plans based on requirements of the old act, the areas subject to those Federal plans would be deprived of the opportunity to utilize the significantly revised and clearly more workable requirements of the revised act. This would be unreasonable, and clearly not our intent.

136 Cong. Rec. S17,237 (daily ed. Oct. 26, 1990). If the court of appeals' judgment in this case is allowed to stand, EPA would be required to follow that highly undesirable—and undemocratic—course.

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to attain the carbon monoxide ambient air quality standards as soon as possible." Pet. App. 16a; see also *id.* at 9a-11a. The decision does not require, however, the adoption of any particular control measures; instead, it preserved EPA's discretion to determine what "control measures" are available to meet the air quality standards.

[11] The first sentence of the savings provision (note 8, *supra*) has no application here because the Administrator did not take any final action to "promulgate[]" or "issue[]" a FIP for the areas in question before enactment of the Amendments.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further proceedings in accordance with this Court's decision in *General Motors Corp.* v. *United States*, 110 S. Ct. 2528 (1990), and the Clean Air Act Amendments of 1990.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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